

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

May 17, 1999

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| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | |
| | : | |
| v. | : | Docket No. CENT 99-72-M |
| | : | A.C. No. 29-00785-05528 |
| AGRONICS INCORPORATED | : | |

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Riley, Verheggen, and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 7, 1999, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Agronics Inc. ("Agronics") for failing to answer the petition for assessment of penalty filed by the Secretary of Labor on December 31, 1998, or the judge's Order to Respondent to Show Cause issued on February 4, 1999. The judge assessed the civil penalty of \$891.00 proposed by the Secretary.

On April 26, 1999, the Commission received a letter from Agronics asserting that the judge's Order of Default was erroneously served on "Leland B. Taylor, Chairman, Agronics Inc." rather than on "Leland Thomas Taylor, President, Agronics Inc." Mot. at 1. Agronics requests that the Order of Default be set aside, denies the violations alleged, challenges the penalty amount, and requests various documents and a hearing. *Id.* at 1-2.

On May 5, 1999, the Commission received the Secretary's opposition to Agronics' request to set aside the Order of Default. The Secretary submits that, at the time MSHA issued the proposed assessment, "Leland B. Taylor" was the agent designated by Agronics. S. Opp'n at 2-3. She asserts that Leland B. Taylor was, therefore, an "agent" of Agronics pursuant to section 3(e) of the Mine Act, 30 U.S.C. § 802(e), and that service upon Leland B. Taylor was sufficient to accomplish service on Agronics. *Id.* at 3. The Secretary also maintains that, "as the judge noted in the order of default, . . . Agronics received a copy of the show cause order," and alleges that Agronics has provided no valid explanation which would excuse the default. *Id.*

The judge's jurisdiction in this matter terminated when his decision was issued on April 7, 1999. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Agronics' letter to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Resources, Inc.*, 10 FMSHRC 1130 (Sept. 1988).

On the basis of the present record, we are unable to evaluate the merits of Agronics' position. In the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See Amber Coal Co.*, 11 FMSHRC 131, 132-33 (Feb. 1989).

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Marks, dissenting:

We vote to treat Agronics' motion to vacate the judge's default order as a timely filed petition for discretionary review, which we would deny. We also vote to deny the motion.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Distribution

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